

APPEAL NO. 051327
FILED JULY 21, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 4, 2005. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first quarter.

The appellant (carrier) appeals, contending that the hearing officer erred in finding that the claimant met his burden of proving a good faith effort to obtain employment commensurate with the claimant's ability to work. The claimant responds, citing the report of his treating doctor showing a total inability to work.

DECISION

Reversed and a new decision rendered.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Pursuant to Section 408.142(a), an employee is entitled to SIBs if on the expiration of the impairment income benefits (IIBs) period the employee: (1) has an impairment rating (IR) of 15 percent or more from the compensable injury; (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment; (3) has not elected to commute a portion of the IIBs; and (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work. The parties stipulated that the claimant's IR is 15% or more (24%), that the claimant did not commute any portion of IIBs and that the qualifying period at issue was from November 19, 2004, through February 17, 2005. An unappealed determination found that the claimant's unemployment was "as a direct of Claimant's impairment." At issue is the good faith criteria of Section 408.142(a)(4) and Rule 130.102(b)(2).

The claimant, a meat cutter, sustained a compensable injury to both his cervical and lumbar spine and had both cervical and lumbar fusions. Apparently his lumbar fusion has continued to cause him problems. The SIBs criterion in issue is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying period for the third quarter. Rule 130.102(d)(4) provides that an injured employee has made good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

Although the hearing officer made no specific finding regarding a narrative report, in his Background Information, the hearing officer references a report dated February 3, 2005, from (Dr. P), the treating surgeon. That report states:

[The claimant] continues to have generalized pain in his back. Due to the chronicity of this even though his x-ray shows excellent fusion, the chronicity of his spasms probably prohibit him from returning to any type of gainful employment; this, plus his multiple arthritic problems for which he is being followed by [a pain management doctor]. Due to his neck problem and his extensive back problem, it is likely that he will continue to develop stress levels on the levels above and below the fusion. I think this will prohibit him from being significantly retrained in any type of active employment.

Regarding this report we would only note that the test is not whether the claimant can return to "gainful employment" or full-time employment but whether he is able "to perform any type of work in any capacity." (Rule 130.102(d)(4)).

The claimant testified that he is able to drive, that his doctor recommends walking a mile every other day, and home exercises twice a day, and that he drives to pick up his grandson from school, watches TV and plays cards. The hearing officer also references a required medical examination (RME) report date February 9, 2005 (six days after Dr. P's report). That six page report is based on an examination on February 9, 2005, and concludes:

The examinee may return to work immediately, with restrictions on lifting. His extensive arthritis will require restrictions on back motion and on lifting. Based on this examination, I find no reason that he could not be treated with exercise and over-the-counter medications.

Attached to the report is this Work Status Report (TWCC-73) which establishes restrictions on standing, kneeling/squatting and bending and a 20-pound lifting restriction for a maximum of no more than eight hours a day. The hearing officer addresses this report by saying it "is in extreme contrast to that of [Dr. P]," notes it is "during the same time frame" and rejects it "[u]nder the circumstances of this case . . . not to be credible." The Appeals Panel has frequently noted that in cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject the records as not credible without explanation or support in the record. Texas Workers' Compensation Commission Appeal No. 020041-s, decided February 28, 2002. However, "[t]he mere existence of a medical report stating the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work. The hearing officer still may look at the evidence and determine that it failed to show this." However, in the instant case, we cannot agree that no other record showed that the claimant had an ability to work during the relevant time period. The hearing officer failed to articulate a rational basis for rejecting the RME report other than

to say it was “in extreme contrast to that of [Dr. P].” In the absence of such an explanation, and in view of Dr. P’s reference to “gainful employment” we hold that the hearing officer’s determination that the claimant satisfied the good faith requirement of Rule 130.102(d)(4) to be so against the great weight of the evidence as to be clearly wrong and manifestly unjust.

Accordingly, we reverse the determinations that the claimant had no ability to work, that he met the good faith requirement to obtain employment commensurate with the claimant’s ability to work and that he was entitled to SIBs for the first quarter and render a new decision that the claimant is not entitled to SIBs for the first quarter.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS STREET, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701-2554.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge